

**DECISION OF THE HEARING EXAMINER  
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of

**Mark Knudsen and Sarah Fiskén**

**RUE17015**

For a Reasonable Use Exception

**Introduction**

Mark Knudsen and Sarah Fiskén applied for a Reasonable Use Exception to construct a single-family residence on property at 9996 Ewing Street.

An open record public hearing was held September 22, 2011. Heather Beckmann, Associate Planner, represented the Director, Department of Planning and Community Development. Mr. Knudsen represented the applicants.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony and exhibits admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

**Findings**

1. Mark Knudsen and Sarah Fiskén, (hereafter “Applicants”) applied for a Reasonable Use Exception (“RUE”) to allow them to construct a single-family residence to replace the existing manufactured house on property variously shown in the record as 9996 Ewing Street and 9996 N.E. Ewing Street.
2. The 9,583 square foot waterfront lot is located on a north-facing hillside that slopes down to Eagle Harbor and is oriented north-south lengthwise. The lot’s depth is approximately 112 feet. Existing development is a mobile home with decks and small shed, parking area, a stairway to the beach, a rock bulkhead and pier. The construction occurred in 1992. The footprint of the residence is 1,114 square feet and the deck’s is 871 square feet. The shed is approximately 100 square feet in area. The properties to the west and the south have single-family residences as well.
3. The Bainbridge Island Comprehensive Plan designates the subject property and surrounding property as OSR-2, Open Space Residential, two residences per acre. The

property is zoned Residential 2 Units Per Acre (R-2), in which single-family dwellings are permitted. Section 18.30.020. The minimum lot area size in the zone is 20,000 square feet, Section 18.30.040, and though the size is substandard, it was lawfully created and may be used for a single-family residence. Section 18.87.050. The City's Shoreline Master Program ("SMP") designates the site and its surroundings as a Semi-Rural environment. The Semi-Rural environment of the shorelines accommodates low to medium density residential development.

4. The site contains a landslide hazard area because there is a slope of 40 percent or greater. Section 16.20.150E.2.a establishes a buffer from the edges of a landslide hazard area equal to the height of the slope, which, on this site, is around 75 ft. The combination of the 75 ft. slope, 75 ft. buffer and a 15 ft. building setback requirement, is greater than the depth of the lot, leaving the lot unbuildable and the existing development nonconforming.

5. Section 16.20.150E.2.a allows a buffer reduction, provided a geotechnical report shows that the reduction would not reduce the level of protection to the development and surrounding properties below set standards in the Code. However, the buffer must not be reduced below 10 ft., Section 16.20.150E.2.a(i)(B), plus the 15 ft. building setback so the total with the steep slope would be 100 ft. on the subject site. The buildable portion of the lot with the allowable reduction then would allow for a structure with a footprint of 550 to 715 square feet, approximately half of the existing footprint.

6. A geotechnical report (Exhibit 3) was provided by Perrone Consulting, Inc. The investigation for the report found that erosion and landsliding have created a bowl-shaped depression in the center portion of the slope. A 2007 landslide on the property to the east encroached on the subject site leaving an unstable 5 ft. high head scarp at the top of the slope but the upland area where the house would be sited is stable. The large fir trees show that no landsliding has occurred upslope of the head scarp for at least 100 years. Regrading, i.e., excavating for a basement level and lowering site grades under the deck area to reduce soil loading upslope of the steep head scarp area, surface water runoff control, and subsurface drainage will be required to improve site stability and reduce the risk of future slope erosion. The basement would have the effect of lowering the foundations for greater stability. Based on various tests and analyses regarding slope stability the report concludes that the proposed construction is feasible and that if the house is located at least 15 ft. from the top of the steep slope, slope stability would be significantly greater than the minimum acceptable value.

7. The existing residence does not have a foundation so instability is a concern.

8. The new residence would occupy the existing footprint. Only that portion of the deck elevated at least 5 feet above grade is considered for lot coverage, according to a 2005 lot coverage interpretation (Exhibit 18). The footprint of the new residence and that area of the deck above five feet and would total exactly 1,200 square feet. Exhibit 19. The shed would cause lot coverage to exceed the maximum so is to be removed.

9. Maximum lot coverage in the R-2 zone is 20 percent, Section 18.30.050, and the proposed coverage is 13 percent.

10. The Director, Department of Planning and Development, (hereafter "Director") determined that a habitat management plan is not required where the proposal is to reduce the landslide hazard area buffer and the building setback.

11. A 50 ft. native vegetation zone is required in the Semi-Rural shoreline environment. Section 16.12.150. The house and decks would be at least 70 feet from the OHWM and there would be no disturbance in the native vegetation zone satisfying that requirement.

12. The shoreline setback line is established by the adjacent principal building when there is only one and that building is set back farther than 50 ft. Section 18.78.060. The adjacent building in this case is set back 61 feet and the proposed redevelopment is approximately 75 ft. from the shoreline so satisfies the shoreline setback requirement.

13. The shoreline regulations also require that side yards within 200 feet of the OHWM total at least 30 percent of the lot width and remain free of structures and impervious surfaces. Section 16.12.260B.8. The requirement would be 24 feet of side yard on the 80 ft. wide property, but currently only 18 feet of the lot width, located on the west side, is free of impervious surface. The east side is occupied by a parking area, for which there is no other location on site because of the location of the septic tank. The proposal does not encroach any further into the side yards so Section 16.12.390 regarding nonconforming development allows continuation of the nonconforming condition provided the structure is rebuilt within two years of demolition and the nonconformity is not increased.

14. The height limit in the R-2 zone is 30 feet. Section 18.30.070. The proposed building would not exceed that limit and the Director recommends a condition that the building not exceed that limitation.

15. Section 18.30.060 requires setbacks facing streets of not less than 25 feet, side setbacks of at least 15 feet in total with no side setback less than five feet, and rear setbacks of at least 15 feet. Since no portion of the site faces a street there are three side setbacks. Currently, the shed is closer than five feet from one lot line, however the shed is required to be removed. With its removal the proposal will meet the zoning setback requirements for side yards. The distance from the shore to the structure on the north side would satisfy either the front or rear setback requirement.

16. The site is currently served by electric, natural gas, water, garbage, and telephone services so there would be no change to its demand on capacity of the utilities. The existing development utilizes a septic system.

17. The Fire Marshall reviewed the proposal and indicated that the Fire Code does not require any improvements to the existing access; that the fire flow requirements will be met by compliance with NFPA 1142; and that the project must comply with all other applicable provisions of the Fire Code. Exhibit 10.

18. The Director issued a Notice of Mitigated Determination of Nonsignificance (MDNS) for the proposal on August 26, 2011 pursuant to SEPA. Conditions of the MDNS included following the recommendations in the geotechnical report to protect the slope.

19. The Director recommended approval of the RUE subject to imposition of the conditions of the MDNS and additional conditions relating to drainage requirements, deck foundations, grading, shed removal, indemnification, height, Fire Code compliance, sewage disposal permit, and conformance of the building permit to the May 18, 2011 site plans.

20. The type of foundation proposed minimizes the amount of excavation needed.

21. Any potential impact to the critical area would be mitigated by the conditions proposed, including the recommendations in the geotechnical report, governing the nature of foundations for the house, basement and decks, stormwater drainage system, grading, planting on the slope, etc.

22. A single-family residence in a residential zone is the minimum development necessary to allow reasonable use of the property. While the property has already been improved with a single-family residence, the existing house as constructed presents a safety issue, so not allowing its replacement would deny all reasonable use of the property. The reasonable use review criterion that total lot coverage not exceed 1,200 square feet represents the City's determination that up to 1200 square feet is deemed reasonable use. Testimony of Beckmann.

23. Applicants have taken no action that created the total absence of developable area on the property.

24. Other mechanisms such as buffer averaging, a variance, or a habitat management plan are not available to reduce the buffer below 10 feet and the building setback below 15 feet which would allow only a footprint approximately half the size of the existing house and no decks. The RUE for the development is the only feasible alternative to achieve reasonable development.

25. Because of the nonconforming lot area and the geologically hazardous area, and given the risk that the lack of foundation for the existing house poses, Applicants would have no reasonable use of the property without the requested exception.

26. Goal 1 of the Comprehensive Plan relating to Geologically Hazardous Areas is to protect landslide hazard areas from the impacts of development for the protection of public safety, property and the environment. The policy is to avoid use of such areas but the area and its buffer totally encompass this site, the proposed development is designed to prevent damage and preserve existing vegetation to the extent possible responding to that policy. The geotechnical report and its recommendations, proposed as conditions of approval, address mitigation of drainage, surface water discharge, sedimentation, erosion, landslides, etc., and restriction of construction to dry periods, all responding to the policies in support of Goal 1.

27. The criteria for approval of an RUE are as follows:

1. The application of this chapter would deny all reasonable use of the property.
2. There is no reasonable alternative to the proposal.

3. The proposed impact to the critical area is the minimum necessary to allow reasonable use of the property.
4. The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant, or of the applicant's predecessor, that occurred after February 20, 1992.
5. The proposed total lot coverage does not exceed 1,200 square feet.
6. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property.
7. Any net loss of critical area functions and values, as determined by a qualified consultant through the application of best available science, will be mitigated on-site to the extent feasible if off-site options are not available. If off-site options, such as a fee-in-lieu or mitigation banking program, are available, the mix of on-site and off-site mitigation should be based on recommendations of the consultant.
8. A habitat management plan has been prepared pursuant to BIMC 16.20.060, unless it is determined through the applicable review process that such a plan is unnecessary.
9. The proposal is consistent with other applicable regulations and standards.

Section 16.20.080G.

28. A Notice of Public Hearing for this application was published, mailed and posted on September 2, 2011.

### **Conclusions**

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. Notice and public hearing requirements of the Code were met.
3. Applicants have demonstrated by clear and convincing evidence, as required by Section 16.20.080H, that with the imposition of the MDNS conditions and those recommended by the Director, the criteria for approval of the requested RUE are met. The findings show that without the RUE all reasonable use of the property would be denied; that the landslide hazard area and its buffer cover the entire site, and even with the buffer reduction options in the Code there is no reasonable alternative to the proposal to achieve any reasonable use; that the impacts of the proposed structure mitigated by conditions are the minimum necessary to allow reasonable use of the property; that Applicants have not taken any action that resulted in the restrictions on the property; that the proposed lot coverage does not exceed the 1,200 sq. ft. maximum; that the public health, safety or welfare is not threatened by the proposal with the conditions

recommended; that the record shows no net loss of critical area functions and values; that the Director has determined that the no habitat management plan is required; and that the proposed development is consistent with, or with the recommended conditions of approval, will be consistent with, the Comprehensive Plan and all other regulations. Therefore, the ERU should be approved subject to the recommended conditions.

### **Decision**

The Reasonable Use Exception is granted subject to the following MDNS conditions and the project conditions recommended by the Director:

#### **SEPA CONDITIONS:**

1. The applicant is to follow the recommendations from the Perrone Consulting, Inc. geotechnical report as necessary. Such conditions will be reviewed at building permit submittal and include but are not limited to the following:
  - a) Any cleared vegetation should be restricted to the pipeline corridor. Areas disturbed should be immediately protected from erosion by placing straw and jute matting anchored to the slope.
  - b) All roots and stumps should be completely removed and all areas be graded.
  - c) After clearing, exposed topsoil should be removed to an approved upland location.
  - d) The applicant shall submit a slope planting plan from a horticulturalist with the building permit that would significantly diminish or eliminate surficial erosion and localized slumping.
  - e) The applicant shall provide a contractor familiar with local, state, and federal safety codes in regards to maintaining safe slopes, should be on site at all times that work is being performed.
  - f) The proposed pipeline corridor butt should be welded and placed directly down the slope to control site drainage.
  - g) Earthwork operations should be performed during the drier summer months.
  - h) The site plans shall provide a storm water drainage collection system for downspouts, surface water runoff from driveways, patios and other developed areas. The drainage plan must have the concurrence of a geotechnical engineer.

- i) The storm drainage system must be inspected by a geotechnical engineer after the facilities are constructed and prior to calling for a drainage inspection.
- j) Rainwater should not be allowed to infiltrate into the ground beneath the deck area. Collected stormwater should be discharged by tightlined to the bottom of the slope.

**PROJECT CONDITIONS:**

- 2. Per the City's Development Engineer, the building permit shall meet the drainage requirements of BIMC 15.20.050(C).
- 3. Per the third party review, additional comments on how the laterals restraint should be used for the deck foundations shall be submitted with the building permit.
- 4. Per the third party review, the statement of concurrence for exemption to allow the grading work to be performed shall be submitted with the building permit.
- 5. The applicant shall submit a permit to remove the shed. The shed shall be removed prior to the issuance of a final building permit on the single family residence.
- 6. An executed indemnification agreement shall be in effect prior to the issuance of a building permit.
- 7. The side yard setbacks may remain as depicted in the May 18, 2011 site plan so long as any new structure is rebuilt within two years of the date of destruction of the mobile home.
- 8. The height of the residence shall not exceed 30 feet.
- 9. The building permit shall substantially conform to the site plans submitted with this application dated May 18, 2011.
- 10. The building permit shall be reviewed for compliance with the requests of the fire marshal.
- 11. Per the Health District, the applicant shall submit a building clearance application for on-site sewage disposal with their building permit application.

Entered this 29<sup>th</sup> day of September 2011.



Margaret Klockars  
Hearing Examiner *pro tem*

### **Concerning Further Review**

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City in this matter. A person with standing may make appeal of this decision to the Kitsap County Superior Court. To be timely, a petition for review must be filed within the 21-day appeal period [see RCW Ch. 36.70].